Response to Illinois Commerce Commission
Staff's Request For Comments

Access One Inc., CIMCO Communications, Inc., Comcast Phone of Illinois, LLC. d/b/a Comcast Digital Phone, Forte Communications, Inc., and Mpower Communications Corp. d/b/a Mpower Communications of Illinois

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Competitive Carriers' Response to Illinois Commerce Commission Staff's Request For Comments

Pursuant to Sections 9-250, 13-101, 13-505, and 13-801 of the Illinois Public Utilities Act ("PUA"), 220 ILCS 5/1-101, *et seq.*, Access One, Inc., CIMCO Communications, Inc., Comcast Phone of Illinois, LLC. d/b/a Comcast Digital Phone, Forte Communications, Inc., and Mpower Communications Corp. d/b/a Mpower Communications of Illinois (collectively, "Competitive Carriers" or "CLECs") through their attorneys, hereby file this Response to the Illinois Commerce Commission Staff's Request For Comments to Determine Whether Rates For Competitive Telecommunications Services are "just and reasonable".

Staff Request for Comments

Sections 9-250, 13-101 and 13-505 of the Illinois Public Utilities Act grant the Commerce Commission explicit authority to determine whether rates for competitive telecommunications services (and changes to such rates) are "just and reasonable". The Commission has not previously investigated competitive telecommunications services to determine whether they are just and reasonable. Given recent changes in the competitive landscape, and the promise of a more competitive environment in the future, the Commission Staff believes it appropriate at this time to solicit informal comments from the public and other interested parties as to when and how the Commission should undertake such an investigation.

In order to focus the comments, the Commission Staff has prepared a number of questions regarding the "just and reasonable" issue. Staff welcomes any comments on the issue, but is most interested in answers to the questions we have prepared.

Comments should be filed with the Director of the Telecommunications division by February 28, 2006, at the following address.

John Hester
Director, Telecommunications Division
Illinois Commerce Commission

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Q Should the Commission's decision(s) concerning whether to investigate rates for competitive telecommunications services differ according to provider types and sizes, service or product types, market conditions, service areas, or other such factors? If so, please explain how the Commission's exercise of its authority should vary across such differing factors and why.

Response

The Commission should differentiate between types of services, product types, market conditions, and services areas. More importantly, however, the Commission should differentiate between telecommunications carriers with different numbers of customers. The Commission's rules for determining if prices for competitive services are just and reasonable should recognize that different types of carriers will have a different impact on the existence of a competitive local telecommunications market. The carriers with the greatest potential to have a negative impact on the competitiveness of the market will be the incumbent local exchange carriers (ILECs), because those carriers have the longest history of service and most likely, the majority of the market share. Additionally, the volume of services provided varies significantly among LECs, with ILECs having a significantly greater volume of services than CLECs.

In addition, only those LECs with large volumes of service, such as AT&T Illinois, will be able to cost effectively produce the data necessary for the Commission to determine if rates are just and reasonable. Moreover, the benefit to the public of requiring smaller LECs to prove the reasonableness of their rates

is likely to be outweighed by the cost of obtaining, maintaining and reporting such data. While an LEC such as AT&T Illinois may have the resources and customer base to develop and maintain the data necessary for a cost of service study, smaller carriers will not have the personnel or data to efficiently support such an endeavor. Even companies with significant financial resources may find producing cost studies to be cost prohibitive on a per customer bases unless they have a significant number of customers.

Further, it is not necessary for the Commission to impose the same rules on all carriers. The language of Sections 9-250, 13-101 and 13-505 is very broad. In fact, Section 13-801 explicitly distinguishes the regulatory obligations for competitive and non-competitive services. None of those sections of the Act impose restrictions or limitations on the Commission's obligation and authority to establish that rates are just and reasonable and none of those sections require that all carriers be treated exactly the same. Thus, the General Assembly has issued a broad mandate to the Commission to use its discretion in ensuring that rates for competitive services are just and reasonable.

The Commission's authority to apply different rules to different types of carriers was recently affirmed by the *Illinois Appellate Court in Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 840 N.E.2d 704 (Ill. App. Ct. 4th Dist. 2006). In that case, the Court upheld Part 731 of Title 83 of the Illinois Administrative Code, which established four tiers of rules for wholesale performance standards. The Court rejected the argument of Illinois Bell that the Commission had no authority to impose stricter rules on "Level 1 carriers" (which

included only SBC and Verizon) than the rules imposed on other carriers. The Court determined that in the enabling legislation for wholesale performance standards, Section 13-712(a) of the Act:

> the General Assembly never declared an intent that every telecommunications carrier meet minimum service quality standards in providing special access. Therefore, regulating special access provided only by "Level 1 carriers" does not violate subsection (a).
>
> *Illinois Bell* Slip Op. at 24

The *Illinois Bell* decision is consistent with the principle that an express statutory grant of authority to an administrative agency also includes the authority to do only what is "reasonably necessary" to accomplish the legislature's objective. *Lake Co. Board of Revenue v. Property Tax Appeal Bd.*, 119 Ill. 2d 419, 427 (1998); *Abbott Labs v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 712 (1997). Courts allow reasonable discretion for administrative agencies so they can "accomplish in detail what is legislatively authorized in general terms." *Lake Co. Bd. Of Revenue*, 119 Ill. 2d at 428.

A review of the relevant statutory provisions also shows that the General Assembly did not expect the Commission to use the same procedures for all carriers in order to ensure the reasonableness of rates. The primary source for ensuring that rates for competitive services are just and reasonable is Section 13-101, which provides that for competitive services, "rules and regulations made by a telecommunications carrier affecting or pertaining to its charges or service to the public shall be just and reasonable. . ."

This general mandate is similar to the one given the Commission in Section 13-712(a) of the Act. Just as the Appellate Court found that the general language of 13-712(a) provides authority for the Commission to establish tiers of regulation for wholesale services, the general language of Section 13-101 provides the Commission with authority to use its expertise and judgment to establish different tiers of regulation of competitive services. The Commission can and should use its discretion to scrutinize the rates of carriers such as AT&T Illinois, which have market dominance, along with the resources to meet the burden of proving that its rates are just and reasonable.

Such different treatment is also supported by Section 13-103(b) of the Act, which provides:

> consistent with the protection of consumers of telecommunications services and the furtherance of other public interest goals, *competition in all telecommunications service markets should be pursued as a substitute for regulation* in determining the variety, quality and price of telecommunications services and that the economic burdens of regulation should be reduced to the extent possible consistent with the furtherance of market competition and protection of the public interest; [Emphasis added.]

220 ILCS 5/13-103(b)

Carriers providing services in a competitive market are, by definition, restrained by competitive forces. This is particularly true of CLECs, which must compete against each other as well as the incumbent LECs, and as Section 13-1-3(b) of the Act recognizes, this competition protects consumers and serves the public interest. In addition, the customer base of CLECs is small enough that virtually any requirement that they provide proof of the justness and reasonableness of their rates would become an economic burden that would

frustrate the furtherance of market competition while providing little added protection of the public interest.

Q Should the Commission require that carriers submit information (e.g., cost studies) to assist it in determining whether to open an investigation into the justness and reasonableness of rates for competitive telecommunications services? If not, please explain.

If yes, please address (at a minimum) the following in your answer:

a) The source of the Commission's authority to require such information.
b) A list of such potential information, the purpose of each item, and the circumstances under which the item should be provided.
c) An assessment of whether, and if so why, tariff filings that exceed certain thresholds require more detailed explanations and backup than tariff filings that do not exceed these thresholds? If yes, please provide examples of appropriate thresholds and the additional information that should be required with such a filing.
d) An assessment of whether the Commission should specifically impose on carriers proposing rate changes a requirement that the carrier provide *prima facie* evidence that the proposed changes yield just and reasonable rates?
e) An assessment of whether the Commission should require carriers to file annual demand, rate and/or other data related to their provision of competitive services including an explanation of what should be filed and under what circumstances.

Response

As stated above, the Commission should establish different rules for large incumbent carriers such as AT&T Illinois. CLECs do not believe that there are any circumstances in which the Commission should require CLECs to provide cost studies or any other documentation to justify that their rates are just and reasonable. Because no CLEC has a significant market share in any relevant market, their prices are constrained by the marketplace. The provision of cost

studies would be an unnecessary expense that would provide no benefit to the public. AT&T Illinois, however, is in a different position and it certainly should provide the Commission with necessary information to determine if its rates are just and reasonable.

While each type of service should be treated individually, the starting point for the type of data needed can be found in the Commission's rule for cost of service studies, 83 IAC 791, which states that: "This Part applies to telecommunications carriers providing both competitive and noncompetitive services." This specifically applies to SBC by virtue of the fact that it provides both competitive and noncompetitive services.

Response to (a)

The source of the Commission's authority is Section 13-101 of the Act, which requires that rates be just and reasonable. As noted above, by granting the Commission that general authority, the General Assembly also gave it authority to do what is "reasonably necessary" to accomplish the legislature's objective. That would include the authority to require appropriate cost studies from large, incumbent LECs like AT&T Illinois without a corresponding duty being imposed on CLECs.

Response to (b) through (e)

CLECs take no position on the data that AT&T should be required to submit, other than to note that 83 IAC 791 sets out the type of information to be submitted by carriers that provide both competitive and noncompetitive services. AT&T will continue to provide both until it successfully declares all of its

services competitive. Moreover, 791.10(a) provides that carriers subject to that rule shall submit a LRSIC study "when the Commission requests an LRSIC study in order to establish just and reasonable rates for such service."

CLECs also note that the LRSIC cost of service methodology described in 83 IAC 791 is based on the marginal cost of service methodology this Commission used in Illinois Bell Telephone Company rate cases prior to the enactment of the Federal Telecommunications Act of 1996 and prior to the adoption of 83 IAC 791.

As noted above, however, any rules requiring the submission of cost studies, whether they are based on LRSIC, marginal cost or any other methodology, should not be imposed on CLECs. Only an incumbent LEC with sufficient numbers of customers should be required to submit such information.

Q. Are there any specific factors or circumstances that might automatically "trigger" a Commission Section 9-250 investigation into whether a rate change for a competitive telecommunications service is just and reasonable? If yes, please provide an explanation or justification for each proposed trigger, an analysis of the how such a trigger would be applied, and an explanation of what information would be necessary to apply such a trigger. Examples of factors that might be incorporated into such criteria are:

a) markup over incremental cost;
b) number of competitors providing the service;
c) comparison to rates charged by competitors for similar or identical services;
d) percentage increase over existing rate;
e) complaints;
f) discrimination;
g) reasonableness of profits;
h) markup over fully allocated costs;
i) consistency with other specified statutory and/or public policy goals;
j) the availability of substitute services;
k) elasticity of demand; and

l) industry studies relating to the services in question.

Response:

Automatic triggers, if any are used, should be tailored for the type of service. For example, CLECs note that they are customers of ILECs when they purchase unbundled network elements, special access or resale services. Any criteria the Commission establishes for triggering just and reasonable rate investigations should recognize that some or all of these types of wholesale services may be considered competitive and thus subject the rule. One specific factor or circumstance that might automatically "trigger" a Commission Section 9-250 investigation of wholesale services is where alternatives for wholesale services are constrained such that only the local ILEC offers services to CLECs. An example might be the provision of special access services, where because of limited ubiquity or competitive initiative or vertical merger, competitive alternatives for DS 1s and DS 3s are simply unavailable. Another is in the ICC's Phase I Order in Docket No. 01-0614, where the Commission provided AT&T with the option to file a petition for interim rates that met the cost based requirement in Section 13-801(g) for UNEs required by Section 13-801. 01-0614 (Phase I Order at 64-65). AT&T has declined to respond to the ICC's recommendation.

Q. Should the Commission investigate (through a Section 9-250 hearing) whether a rate change for a competitive telecommunications service is just and reasonable without previously determining a "just and reasonable" standard appropriate for competitive telecommunications service rates? That is, should the Commission establish criteria in a rulemaking or other "global docket" to determine whether a rate for a competitive

telecommunications service is just and reasonable or should the Commission review each tariff on a case by case basis? Please explain.

Response:

CLECs reiterate their last response that the Commission may wish to list criteria that could automatically trigger a rate investigation. Such a rule should be established in a generic proceeding where all parties have the opportunity to comment.

Q Please explain how the "just and reasonable" concept is most appropriately applied to competitive telecommunications services. Please include the following in your answer:

a) Any case law you believe to be directly pertinent or applicable.

b) A proposed "definition" of just and reasonable - as applied to rates for competitive telecommunications services.

c) A list of criteria that would allow the Commission to determine whether a rate for a competitive telecommunications service is just and reasonable Please provide an explanation or justification for each proposed criterion, an analysis of the how such criteria would be applied, and an explanation of what information would be necessary to apply such criteria. Examples of factors that might be incorporated into such criteria are:

i) markup over incremental cost;
ii) number of competitors providing the service;
iii) comparison to rates charged by competitors for similar or identical services;
iv) percentage increase over existing rate;
v) complaints;
vi) discrimination;
vii) reasonableness of profits;
viii) markup over fully allocated costs;
ix) consistency with other specified statutory and/or public policy goals;
x) the availability of substitute services;
xi) elasticity of demand; and
xii) industry studies relating to the services in question.

Response

As noted in the response to the first question and the question below, CLECs believe that the services of CLECs could be considered just and reasonable simply by the fact that the CLECs are participating in a highly competitive market that should drive prices to a just and reasonable level. The services of large incumbent LECs, however, should be considered to be just and reasonable only if they can pass an appropriate cost of service standard. CLECs believe that the LRSIC methodology set out in 83 IAC 791 provides the best measure of just and reasonable costs for large incumbent LECs. Illinois was one of the leaders in the country in using marginal cost studies to set rates in the telecommunications industry. The LRSIC methodology is a refinement of the marginal cost analysis used by this Commission to set Illinois Bell Telephone Company's rates prior to the adoption by that company of alternative regulation. It is a theoretically sound methodology that results in rates that send proper price signals to customers and to their provider.

Q. Can the Commission rely on market forces to ensure that rates for competitive telecommunications services (as identified and specified by the PUA) are just and reasonable without abrogating its responsibility to review such rates under Section 13-505?

a) If yes, please identify and explain any circumstances required to make this possible.

b) If no, please explain how any such circumstances can be objectively identified and measured.

Response

CLECs believe that the Commission can rely on market forces to ensure that rates by CLECs are just and reasonable. Given the nature of the market and customers' willingness to switch providers in order to obtain a better deal, CLECs cannot expect to stay in business while charging rates that are not just and reasonable. The rates of AT&T Illinois, however, require more scrutiny because of its historic position as the monopoly provider of telecommunications services in Illinois. That position may continue, with its recent purchase of the largest CLEC ("AT&T") and the departure of numerous competitive carriers from the local exchange market.

February 28, 2006

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